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EXAMINER

MRUK, BRIAN P

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Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No. 10/042,765	Applicant(s) CASPERSO ET AL.
	Examiner Brian P Mruk	Art Unit 1751

-- Th MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### **Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

1)  Responsive to communication(s) filed on 13 December 2002.

2a)  This action is **FINAL**.                    2b)  This action is non-final.

3)  Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## **Disposition of Claims**

4)  Claim(s) 1-32 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5)  Claim(s) \_\_\_\_\_ is/are allowed.

6)  Claim(s) 1-32 is/are rejected.

7)  Claim(s) \_\_\_\_\_ is/are objected to.

8)  Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

9)  The specification is objected to by the Examiner.

10)  The drawing(s) filed on \_\_\_\_\_ is/are: a)  accepted or b)  objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)  The proposed drawing correction filed on \_\_\_\_\_ is: a)  approved b)  disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)  The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

13)  Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a)  All b)  Some \* c)  None of:  
1.  Certified copies of the priority documents have been received.  
2.  Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3.  Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.

14)  Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a)  The translation of the foreign language provisional application has been received.

15)  Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

1)  Notice of References Cited (PTO-892) 4)  Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_ .  
2)  Notice of Draftsperson's Patent Drawing Review (PTO-948) 5)  Notice of Informal Patent Application (PTO-152)  
3)  Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_ . 6)  Other: \_\_\_\_\_ .

**DETAILED ACTION**

***Claim Rejections - 35 USC § 112***

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 1-29 and 32 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

3. In instant claim 1, applicant claims that a nonionic polyether polyurethane polymer and/or a cationic conditioning agent is/are present in the dye composition, thus suggesting that the polyether polyurethane polymer does not have to be included in the dye composition. Applicant than further states in claim 1 that the polyether polyurethane polymer is present in a sufficient amount to impart rheological properties and to enhance the hair conditioning effect, thus suggesting that the polyether polyurethane polymer must be present in the dye composition. Clarification as to whether or not the polymer must be present in the claimed dye composition is required.

4. Instant claim 3 contains the trademark Aculyn 44; instant claim 5 contains the trademark Aculyn 46; and instant claim 7 contains the trademarks Neodol 25-3 and Neodol 25-7. Where a trademark or trade name is used in a claim as a limitation to

identify or describe a particular material or product, the claim does not comply with the requirements of 35 U.S.C. 112, second paragraph. See *Ex parte Simpson*, 218 USPQ 1020 (Bd. App. 1982). The claim scope is uncertain since the trademark or trade name cannot be used properly to identify any particular material or product. A trademark or trade name is used to identify a source of goods, and not the goods themselves. Thus, a trademark or trade name does not identify or describe the goods associated with the trademark or trade name. In the present case, the trademarks/trade names are used to identify/describe products and, accordingly, the identifications/descriptions are indefinite.

5. Regarding claim 25, the phrase "and other" renders the claim(s) indefinite because the claim(s) include(s) elements not actually disclosed (those encompassed by "and other"), thereby rendering the scope of the claim(s) unascertainable. **See MPEP § 2173.05(d).**

6. Claims 28 and 29 recite the limitation "the final composition" in line 2 of the respective claims. There is insufficient antecedent basis for this limitation in the claim. Claim 1 discloses a two part hair dye composition for the oxidative dyeing of hair, but never mentions a "final composition" of the hair dye.

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7. Claim 32 recites the limitation "said dye composition mixture" in lines 3 and 4. There is insufficient antecedent basis for this limitation in the claim. Claim 1 discloses a two part hair dye composition for the oxidative dyeing of hair, but never mentions the mixture of the two part hair dye composition.

***Claim Rejections - 35 USC § 102***

8. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

- (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.
- (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

***Claim Rejections - 35 USC § 103***

9. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

- (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

10. Claims 1, 6, 8, 10-25, and 32 are rejected under 35 U.S.C. 102(b) as being anticipated by Cotteret et al, U.S. Patent No. 5,500,021.

Cotteret et al, U.S. Patent No. 5,500,021, discloses a hair dye composition for the oxidative dyeing of hair comprising a first component which comprises a primary dye

intermediate (3-methyl-p-aminophenol, 0.45% by weight), a coupling agent (2-methyl-5-aminophenol, 0.6% by weight), a cationic conditioning agent (cationic polyquaternium compound, 1.1% by weight), an organic solvent (ethyl alcohol, 5.0% by weight), a rheology modifier (the fatty alcohol oleic acid, 10% by weight), a nonionic surfactant (polyoxyethylenated cetyl/stearyl alcohol), an antioxidant (hydroquinone), an alkalizing agent (monoethanolamine), and water (7.46% by weight; see column 6, Example 1), per the requirements of the instant invention. It is further taught by Cotteret et al that the hair dye composition contains a second component that comprises an oxidizing agent (hydrogen peroxide, 3% by weight), and that components one and two of the hair dye composition are mixed together (weight for weight) at the moment of use (see column 6, lines 37-41). Furthermore, note that all cited percentages are given for the mixture of the two components. Cotteret et al further discloses that the above mentioned hair dye is used in a process to dye grey hair, wherein the hair dye mixture is applied to the hair for 30 minutes prior to being rinsed, washed, and dried (see column 6, lines 42-46). Therefore, instant claims 1, 6, 8, 10-25, and 32 are anticipated by Cotteret et al, U.S. Patent No. 5,500,021.

11. Claims 1, 6-25, 28, and 32 are rejected under 35 U.S.C. 102(b) as being anticipated by Feinland et al, U.S. Patent No. 4,402,700.

Feinland et al, U.S. Patent No. 4,402,700, discloses a composition that simultaneously dyes and conditions hair comprising an oxidation dye intermediate (i.e. a primary dye intermediate; see column 10, lines 9-40), a coupling component (see

column 11, lines 27-31), an oxidizing agent (see column 10, lines 9-40); a quaternary amine (i.e. a cationic conditioning agent, see column 10, lines 9-40), a neutral surfactant (see column 10, lines 45-47), and an alkalizing agent (see column 10, lines 9-40), per the requirements of the instant invention. It is further taught by Feinland et al that the quaternary amine includes dicoco dimethyl ammonium chloride (see column 10, lines 60-62), and that the quaternary amine is present in the dye composition in an amount between 0.05-5% (see column 10, lines 17-18), that the oxidation dye intermediate includes N,N-bis(Beta-hydroxyethyl)-p-phenylenediamine (see column 11, lines 1-19), that the coupling component includes alpha-naphthol (see column 11, lines 34-35), that the oxidizing agent includes hydrogen peroxide (see column 10, lines 41-42), and that the alkalizing agent includes ethanolamine (see column 10, lines 49-50). Feinland et al further discloses a two part dye composition, wherein the first part is comprised of nonoxynol-4 (a nonionic surfactant and a rheology modifier; 4% by weight), soya trimethyl ammonium chloride (a cationic conditioning agent; 1.5% by weight), amino methylpropanol (an alkalizing agent; 2% by weight), isopropanol (an organic solvent; 7% by weight), p-phenylenediamine (a primary dye intermediate; 0.1% by weight), resorcinol (a coupling agent; 0.1% by weight), a fragrance (0.2% by weight), and water (42.2% by weight; see columns 7 and 8, Table II, Example 5). It is further taught by Feinland et al that the second part of the dye composition comprises a 6% aqueous solution of hydrogen peroxide, and that the two parts of the dye composition are mixed together in equal volumes immediately before use (see column 8, lines 28-32). Feinland et al further discloses that the dye composition is used in a method to dye hair,

wherein the dye is applied to the hair for a period of time prior to shampooing (see column 7, lines 23-31). Therefore, instant claims 1, 6-25, 28, and 32 are anticipated by Feinland et al, U.S. Patent No. 4,402,700.

12. Claims 1, 6-25, 28-29, and 32 are rejected under 35 U.S.C. 102(b) as being anticipated by Cohen et al, U.S. Patent No. 5,393,305.

Cohen et al, U.S. Patent No. 5,393,305, discloses a hair dye composition for the oxidative dyeing of hair comprising a first component which comprises p-phenylenediamine (a primary dye intermediate; 0.02% by weight), resorcinol (a coupling agent; 0.03% by weight), Polyquaternium-22 (a cationic conditioning agent; 2.0% by weight), hexylene glycol (an organic solvent; 3.5% by weight), 28% ammonia (an alkalizing agent; 1.96% by weight), and water (86.12% by weight; see column 12, Dye Lotion Example 1), per the requirements of the instant invention. It is further taught by Cohen et al that the second part of the dye composition comprises an aqueous solution of hydrogen peroxide (an oxidizing agent; 3.0% by weight), and nonoxynol-4 (a non-ionic surfactant and a rheology modifier; 0.2% by weight), and that the two parts of the dye composition are mixed together to form the hair coloring composition (see column 12, lines 5-11), which is then applied to the hair for the entire coloring period (see column 10, lines 63-68 and column 11, lines 1-8). Cohen et al further discloses that oleic acid (a fatty alcohol; 5.0% by weight) can be incorporated into a two part hair dye composition that is analogous to the two part composition mentioned above (see column 12, Dye Lotion Example 4), or that Polyquaternium-6 can be used in place of

Polyquaternium-22 in a hair dye composition that is similar to the one mentioned above (see column 12, Dye Lotion Example 3). Therefore, instant claims 1, 6-25, 28-29, and 32 are anticipated by Cohen et al, U.S. Patent No. 5,393,305.

13. Claims 30-31 are rejected under 35 U.S.C. 102(b) as being anticipated by Cauwet et al, U.S. Patent No. 5,478,562.

Cauwet et al, U.S. Patent No. 5,478,562, discloses a cosmetic composition for treating hair comprising at least one polyetherurethane (see col. 1, lines 10-35). Specifically, note Example 3, which discloses a shampoo composition for washing hair comprising 2 grams of polyetherurethane and 0.5 grams of diallyldimethylammonium chloride, and Example 5, which discloses a conditioning composition which is applied to dry or wet hair and comprises 7 grams of polyetherurethane and 1 gram of cetyltrimethylammonium chloride, as required by applicant in the instant invention. Therefore, instant claims 30-31 are anticipated by Cauwet et al, U.S. Patent No. 5,478,562.

14. Claims 30-31 are rejected under 35 U.S.C. 102(b) as being anticipated by Emmons et al, U.S. Patent No. 4,155,892.

Emmons et al, U.S. Patent No. 4,155,892, discloses a polyether polyurethane thickener for aqueous systems (see abstract). Specifically, note Example 281, which discloses a hair conditioner comprising 1.5% by weight of a polyether polyurethane

thickener of Example 191 and 0.05% by weight of Arquad 2 HT-75 (i.e. dimethylditallow quaternary ammonium chloride), as required by applicant in the instant invention.

Therefore, instant claims 30-31 are anticipated by Emmons et al, U.S. Patent No. 4,155,892.

15. Claims 1-3, 6, 11-18, 25-28, and 32 are rejected under 35 U.S.C. 102(a) as being anticipated by Dias et al, WO 97/24106.

Dias et al, WO 97/24106, discloses a hair coloring composition comprising p-phenylenediamine (a primary dye intermediate; 0.8% by weight), p-aminophenol (a primary dye intermediate; 0.2% by weight), m-aminophenol (a coupling agent; 1.0% by weight), resorcinol (a coupling agent; 1.6% by weight), Aculyn-44 (a polyether polyurethane polymer; 0.5% by weight), nonoxynol-9 (a nonionic surfactant and a rheology modifier, 1.0% by weight), hydrogen peroxide (an oxidizing agent; 4.5% by weight), ethylenediamine tetraacetic acid (a chelating agent; 0.1% by weight) and water (85.3% by weight; see pages 49-51, Example I). It is further taught by Dias et al that the oxidizing agent is stored separately from the rest of the hair dye composition until immediate use (see page 53, lines 12-18), and that the above mentioned hair coloring composition is applied to the hair for a period of 1 minute to 90 minutes (see page 54, Method of Use). Therefore, instant claims 1-3, 6, 11-18, 25-28, and 32 are anticipated by Dias et al, WO 97/24106.

16. Claims 1, 6, 8, 10-25, 28-29, and 32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cotteret et al, U.S. Patent No. 5,500,021.

Cotteret et al, U.S. Patent No. 5,500,021, is relied upon as set forth above as teaching and exemplifying a two part hair dye composition for the oxidative dyeing of hair which contains the claimed hair dyes, oxidants, and cationic conditioning agents. However, the patentee differs from the instant applicant in that Cotteret et al. does not specifically teach the claimed water amounts of 30-90% or 50-70% by weight.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made to add water to Cotteret's exemplified composition (see column 6, Example 1) in the claimed amounts, because such water amounts are conventional in oxidative hair dye compositions. Furthermore, optimization of the amount of each component added to Cotteret's hair dye compositions would have been obvious to one of ordinary skill in the art in order to obtain the best hair dyeing results. See *In re Boesch*, 205 USPQ 215, and *In re Luck*, 177 USPQ 523.

17. Claims 1, 6-25, 28-29, and 32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Feinland et al, U.S. Patent No. 4,402,700.

Feinland et al, U.S. Patent No. 4,402,700, is relied upon as set forth above as teaching and exemplifying a two part hair dye composition for the oxidative dyeing of hair which contains the claimed dyes, oxidants, water and cationic conditioners. It is further taught by Feinland et al that water is a major constituent of the dye composition (see column 6, lines 43-46), and that the amount of water present in the general hair

dye composition is between 0-99.45% by weight (see columns 6 & 7, Table I).

However, the patentee differs from the instant applicant in that an example wherein water is used in an amount between 50-70% is not exemplified.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made to formulate a hair dye composition containing the claimed dyes, oxidants, cationic conditioning agents, and water in the claimed amounts, because such oxidative hair dyeing compositions are within the teachings of Feinland et al. Furthermore, optimization of the amount of each component added to Feinland's hair dye compositions would have been obvious to one of ordinary skill in the art in order to obtain the best hair dyeing results, absent a showing otherwise. See *In re Aller*, 105 USPQ 233.

18. Claims 1-32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dias et al, WO 97/24106.

Dias et al, WO 97/24106, is relied upon as set forth above as teaching and exemplifying a hair coloring composition for the oxidative dyeing of hair which contains the claimed dyes, oxidants, water and cationic conditioning agents. It is further taught by Dias et al that C<sub>11-15</sub> Pareth-3 or C<sub>11-15</sub> Pareth-7 may be used as surfactants in the hair dye composition (see page 43, lines 5-11), that optional materials, such as distearyldimethyl ammonium chloride, can be incorporated in to the hair dye in an amount between 0.001-5.0% (see page 48, Optional Materials, lines 8-11 & 30-34), that buffering agents (i.e. alkalizing agents), such as ethanolamine, are added to the dye

composition (see page 17, Buffering Agents, lines 3-5 & 26-30), and that organic solvents (i.e. ethanol, isopropyl alcohol, propylene glycol, and hexylene glycol) can replace water, in part, by up to 50% by weight in the hair dye composition (see page 50, lines 21-26). Dias et al further discloses that synthetic thickeners sold under the trademark Aculyn are suitable for use in the hair dye composition (see page 37, Thickeners, lines 25-31). However, Dias et al does not exemplify a hair dye composition which contains the aforementioned components in the claimed amounts, and does not specifically teach the use of the thickener Aculyn 46.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made to formulate an oxidative hair dye, wherein the composition contains the claimed hair dyes, oxidants, cationic conditioning agents, nonionic polyether polyurethane polymer, surfactants, coupling agents, rheology modifiers, alkalizing agents, organic solvents, water, and other optional materials, because such oxidative hair dyeing compositions are within the teachings of Dias et al. Furthermore, optimization of the amount of each component added to Dias's hair dye compositions would have been obvious to one of ordinary skill in the art in order to obtain the best hair dyeing results. See *In re Aller*, 105 USPQ 233; *In re Luck*, 177 USPQ 523, and *In re Boesch*, 205 USPQ 215. Also, the office holds the position that selection of the claimed Aculyn thickeners would have been obvious to those skilled in the art for use in Dias et al's compositions, because Dias teaches that all Aculyn thickeners are suitable for addition to the patentee's compositions, absent a showing otherwise.

19. Claims 30-31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lim et al, U.S. Patent No. 5,849,042.

Lim et al, U.S. Patent No. 5,849,042, discloses a hair dye composition comprising a dye (see col. 1, lines 34-39), an organic solvent (see col. 2, lines 56-65), 0.1-10% by weight of a thickener, such as Aculyn 44 (i.e. a polyether-polyurethane polymer; col. 3, lines 17-41), surfactants (col. 3, line 59-col. 4, line 14), and 0.1-10% by weight of a cationic conditioner, such as stearyl trimonium chloride (col. 4, lines 15-26). It is further taught by Lim et al that the hair dye is applied to the hair for 10-45 minutes prior to rinsing the hair (see col. 5, lines 27-45). Lim et al does not specifically require a cationic conditioning agent and a polyether-polyurethane polymer in their hair dye composition, as required by applicant in the instant invention.

However, it would have been obvious to a person of ordinary skill in the art at the time the invention was made to formulate a hair dye composition which contained all of the components in the claimed amounts disclosed and taught by Lim et al. Therefore, one of ordinary skill in the art would have had a reasonable expectation of success, because such a hair dye composition is expressly suggested by the Lim et al disclosure, and therefore is an obvious formulation.

### ***Double Patenting***

20. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA

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1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

21. Claims 1-29 and 32 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-30 of U.S. Patent No. 6,156,076. Although the conflicting claims are not identical, they are not patentably distinct from each other because both the instant claims and claims 1-30 of Casperson et al, U.S. Patent No. 6,156,076, claim a similar composition and method for the oxidative dyeing and conditioning of hair with a two part hair dye composition comprising an intermediate dye component, a coupling agent, and oxidizing agent, a polyether polyurethane polymer, a cationic conditioning agent, and water (see claims 1-30 of Casperson et al, U.S. Patent No. 6,156,076), per the requirement of instant claims 1-29 and 32. Therefore, instant claims 1-29 and 32 are an obvious formulation in view of claims 1-30 of Casperson et al, U.S. Patent No. 6,156,076.

22. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

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23. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brian Mruk whose telephone number is (703) 305-0728. The examiner can normally be reached on Monday-Thursday from 7:00 AM to 5:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Yogendra Gupta, can be reached on (703) 308-4708. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9310 (Before Final) and (703) 872-9311 (After Final).

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

*BM*

Brian Mruk  
September 4, 2003

*Brian P. Mruk*  
Brian P. Mruk  
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